

ORIGINAL



0000111849

1 Michael J. LaVelle – State Bar No. 002296
2 Matthew K. LaVelle – State Bar No. 018828
3 **LAVELLE & LAVELLE, PLC**
4 2525 East Camelback Road, Suite 888
5 Phoenix, AZ 85016
6 MJL@LaVelle-LaVelle.com
7 Matt@LaVelle-LaVelle.com
8 Telephone: (602) 279-2100
9 Facsimile: (602) 279-2114
10 *Attorneys for Defendants Tom Hirsch, Diane Rose Hirsch,*
11 *Berta Walder, Howard Walder, Harish P. Shah, Madhavi H. Shah and Horizon Partners, LLC*

9 **BEFORE THE ARIZONA CORPORATION COMMISSION**

10 In the matter of:

11
12 **RADICAL BUNNY, L.L.C.**, an Arizona
13 limited liability company,

14 **HORIZON PARTNERS, L.L.C.**, an
15 Arizona limited liability company,

16 **TOM HIRSCH** (aka **TOMAS N.**
17 **HIRSCH**) and **DIANE ROSE HIRSCH**,
18 husband and wife;

19 **BERTA FRIEDMAN. WALDER** (aka
20 **BUNNY WALDER**, a married person,

21 **HOWARD EVAN WALDER**, a
22 married person,

23 **HARISH PANNALAL SHAH** and
24 **MADHAVI H. SHAH**, husband and
25 wife,

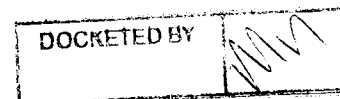
26 Respondents.
27
28

DOCKET NO. S-20660A-09-0107

**REPLY ON MOTION FOR
SUMMARY JUDGMENT**

Arizona Corporation Commission
DOCKETED

MAY 20 2010



RECEIVED
2010 MAY 20 P 4: 49
ARIZONA CORPORATION COMMISSION
DOCKET CONTROL

1 **SUMMARY JUDGMENT MOTIONS ARE CONTEMPLATED IN THESE**
2 **PROCEEDINGS**

3 Nothing in any rule says that motion for summary judgment may not be
4 entertained. Rule R14-3-1, 106(K) says, “[m]otions shall conform insofar as
5 practicable with the Rules of Civil Procedure in the state of Arizona.” Clearly the
6 rules intended to allow motion for summary judgment and just as clearly the rules
7 requiring any statement of fact to be the subject of a controverting statement of
8 fact with testimony under oath govern here. Rule 56, Arizona Rules of Civil
9 Procedure. The Commission asserts all manner of facts, but the only record in this
10 proceeding at this point is the record made by the statement of facts, verified by
11 affidavit and appearing in support of the motion for summary judgment.
12

13 **THESE PARTICIPATIONS WERE NOT SECURITIES**
14

15 The essence of this case boils down to one fact and one question of law.
16 The sworn testimony is that the money in question was used to finance
17 construction with a fixed rate of return for what the state alleges was four to
18 fourteen months. Can that be a security? The state admits that the money went to
19 Mortgages Ltd., which then issued notes for it. Whether the Participants had an
20 investment contract or an interest in a note is a distinction of form over substance.
21 In fact, AMFAC flatly says notes used to finance construction are not securities
22 for purposes of the act. *State v. Tober* did not involve anti-fraud civil matters.
23 For purposes of the criminal law, it held that “notes” means note, but carefully
24 noted that the issue of whether the definition for security for anti-fraud purposes is
25 not covered by that case.

26 The state acts as though *AMFAC Mortgage Co. v. Arizona Mall*, 583 F.2d
27 426 (9th Cir. 1978) is dead law. AMFAC clearly recognized the two tests and said
28 “there is a split between different circuits in the analysis that is utilized in defining

1 “securities”; however the importance of this is minimal since the results that are
2 reached are generally consistent.”

3 MacCollum v. Perkinson, 185 Ariz. 175 913 P.2d 1097 (App. 1996) did not
4 reject AMFAC, it just said the case before it did not involve commercial notes, *see*
5 MacCollum. It also held that the security definition for the purposes of anti-fraud
6 enforcement requires a test beyond the listing of what items could be covered by
7 the statute. That test considers: 1) the motivations of the seller and the buyer.
8 Here the seller wanted to raise money for construction and the buyer wanted to get
9 a fixed rate of return; 2) plan of distribution. Here there was no scheme for
10 marketing the notes. It proceeded by word of mouth and one participant referred
11 another; 3) reasonable expectations of the existing investing public. There is
12 nothing about notes or financing for buildings under construction that would cause
13 the investing public to think that it was buying stock or a security; and 4) the
14 existence of another risk reducing regulatory scheme. Here to the extent
15 necessary, Mortgages Ltd. notes were already registered.
16

17 Moreover, in many instances the notes are not alleged to have exceeded one
18 year and fit into the nine month exception offered by A.R.S. §44-1843 A (8). But
19 the test articulated in Reves v. Ernst Young, 494 U.S. 56 (1990) also recognizes
20 that the investment vehicle would not be a security if it “bears a strong
21 resemblance” to an instrument listed in an enumerated category of exceptions.
22 The participants in some instances received participations that were to pay in less
23 than nine months. The Petition concedes they were never for more than fourteen
24 months. In all respects, they resembled the commercial notes intended to be
25 exempted by statute. AMFAC found two year fixed return notes to be exempt.
26 Here there was no equity participation and no condition on payment. These were
27 participations in notes. No layman would reasonably expected them to be treated
28 as securities.

1 These participations as a matter of law were not securities.

2
3 RESPECTFULLY SUBMITTED this 20th day of May, 2010.

4 LAVELLE & LAVELLE, PLC

5
6
7 By: 

8 Michael J. LaVelle

9 2525 E. Camelback Rd., Ste. 888

10 Phoenix, AZ 85016

11 *Attorneys for Defendants Tom Hirsch, Diane Rose Hirsch,
Berta Walder, Howard Walder, Harish P. Shah, Madhavi H.
Shah and Horizon Partners, LLC*

12 ORIGINAL and 13 COPIES filed this
13 20th day of May, 2010 with:

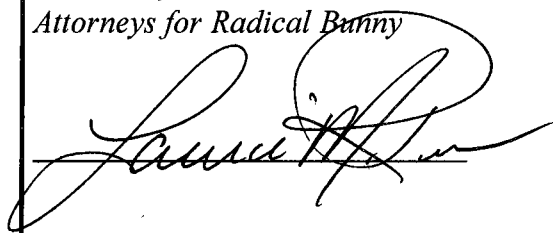
14 ARIZONA CORPORATION COMMISSION
15 Securities Division
16 1300 West Washington, Third Floor
17 Phoenix, Arizona 85007

18 COPY of the foregoing MAILED this
19 20th day of May, 2010 to:

20 Lyn Farmer
21 Chief Administrative Law Judge
22 ARIZONA CORPORATION COMMISSION
23 1200 West Washington
Phoenix, Arizona 85007

24 Julie Coleman
25 ARIZONA CORPORATION COMMISSION
26 Securities Division
27 1300 West Washington, Third Floor
Phoenix, Arizona 85007

1 Jordan A. Kroop
2 Thomas J. Salerno
3 **SQUIRE SANDERS & DEMPSEY, LLP**
4 Two Renaissance Square
5 40 North Central Avenue, Suite 2700
6 Phoenix, Arizona 85004-4498
7 *Attorneys for Radical Bunny*

8 
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28